(21)

No. 98-404

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
APPELLANTS,

V.

UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,
APPELLEES.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES HOUSE OF REPRESENTATIVES

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MISCELLANEOUS

STATEMENT

I. BACKGROUND OF THE CONTROVERSY

Houses of Congress rarely come to court. But this is an extraordinary case. The membership of the House must be reapportioned early in 2001, and the legitimate composition of this institution cannot be determined unless the Department of Commerce conducts a lawful enumeration. *See* 2 U.S.C. § 2a. The Secretary of Commerce, however, plans to spend $4 billion on a census that will use statistical sampling to *estimate* the population, even though two three-judge courts have unanimously held that the plan is unlawful. Appellants have announced their intention to ignore these judicial opinions and estimate the population unless this Court reaches the merits and tells them they cannot do so. That is exactly what this Court should do. There is no constitutional bar to judicial relief in these unprecedented circumstances.

1. Appellants seek to justify their decision to use sampling to estimate the population in 2000 based upon concerns that many residents, including a disproportionate number of minorities, will be missed by a headcount. J.A. 48-49, 55. This problem is as old as the Republic. *Every* decennial census since 1790 has resulted in an undercount that affects some groups more than others.[1] Yet, consistent with the constitutional mandate for an actual enumeration and explicit congressional directives, each decennial census since 1790 has been designed to determine the population by counting the people, one by one. *See Wisconsin v. City of New York*, 517 U.S. 1, 6-8 (1996); *infra* at 34-35, 49-50.

While modern transportation has improved coverage in

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[1] *See, e.g.*, Bureau of the Census, *A Century of Population Growth* 45 (1909) ("[I]t is reasonable to suppose that many of the households of the pioneers were not enumerated"); Hyman Alterman, *Counting People: The Census in History* 198-200, 262-63 (1969); *Tucker v. United States Dep't of Commerce*, 958 F.2d 1411, 1412 (7th Cir.) (undercount "is concentrated in the poor . . . and among illegal aliens"), *cert. denied*, 506 U.S. 953 (1992).

remote areas, other problems, including deliberate avoidance by "certain segments of the population who have no interest in participating in the census," continue to contribute to the undercount.[2] Despite these difficulties, the 1980 and 1990 censuses are believed to have been the most accurate to date, accounting in net for 98.8% and 98.2% of the population. J.A. 48. Moreover, in absolute terms, the 1990 census was substantially more successful in counting minorities than any but the 1980 census.[3]

2. Although Appellants contend that statistical sampling will improve accuracy, they have acknowledged that the use of sampling "deviate[s] sharply from tradition," J.A. 153, and that, "compared to using counting methods alone," the use of sampling requires "complex, technical calculations and assumptions that will undoubtedly be controversial, even among statisticians."[4] In 1990, the Secretary rejected demands that he use estimates derived from a post-enumeration survey to adjust the headcount, stating that he was unwilling to "abandon a two hundred year tradition of how we actually count people." *See* United States Dep't of Commerce, *Adjustment of the 1990 Census for Overcounts and Undercounts of Population and Housing Notice of Final Decision*, 56 Fed. Reg. 33,582 (1991). The Secretary was

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2 *Oversight of the 2000 Census: Review of Census Bureau Planning and Preparations in Response to the Federal Court Ruling that Sampling is Illegal, Hearing before the Subcomm. on the Census of the House Comm. on Gov't Reform and Oversight*, 105th Cong., 2d Sess. 67 (Sept. 9, 1998) ("*Oversight Hearing II*") (testimony of Acting Director James F. Holmes).

3 *Compare Report to the House Comm. on Post Office and Civil Service by the Comptroller General of the United States, Programs to Reduce the Decennial Census Undercount* 6 (GGD-76-7 1976) (estimated undercount rate for African Americans was 8% and 7.7% in 1960 and 1970), *with* J.A. 265 (rate estimated at 4.4% in 1990).

4 *Status of Planning for the 2000 Census, Hearing before the Subcomm. on Census, Statistics and Postal Personnel of the House Comm. on Post Office and Civil Service*, 103d Cong., 2d Sess. 14 (Jan. 26, 1994).

"deeply concerned" that the use of sampling techniques would "open the door to political tampering with the census," because the techniques "depend[] heavily on assumptions," the results change "in important ways" when the assumptions change, and use of this method could "subject the Census Bureau to partisan pressures." *Id.* at 33,583, 33,605. Given the sensitivity of the apportionment formula, subjective choices among equally defensible statistical mechanisms would have altered the composition of the House. *Id.*[5] This Court affirmed the Secretary's decision. *City of New York*, 517 U.S. at 24.

Unlike the 1990 census, Appellants have deliberately designed the 2000 census to make it impossible for the Secretary, the President, or Congress to opt for an unadjusted headcount after the census has been conducted -- even if they are convinced that the sampling-based estimates are unreliable -- since, under Appellants' plan, sampling will be used in lieu of actual counts for a substantial segment of the population.[6] In prior censuses, the Bureau dispatched an enumerator to obtain information from each household that did not respond to mail questionnaires.[7] This time, enu-

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5 The Secretary cited findings that, of five reasonable alternative adjustment methods, none would have resulted in the same apportionment, and 11 different States would have lost or gained a seat depending on the method chosen. *Id.* at 33,583.

6 J.A. 158-59. Then-Census Bureau Director Riche declared in 1995 that the Bureau "must produce a 'one-number census' that . . . allows the decennial results to be determined by statisticians at the Census Bureau, not by lawyers and judges." *Oversight of the Census Bureau: Preparations for the 2000 Census, Hearing before the Subcomm. on Nat'l Security, Int'l Affairs, and Criminal Justice of the House Comm. on Gov't Reform and Oversight*, 104th Cong., 1st Sess. 80 (Oct. 25, 1995) (emphasis omitted).

7 *See City of New York v. United States Dep't of Commerce*, 34 F.3d 1114, 1121 (2d Cir. 1994) (noting that enumerators made as many as six visits to each non-responding household), *rev'd sub nom., Wisconsin v. City of New York*, 517 U.S. 1 (1996). If these efforts failed, the enumerator would obtain information from a neighbor or other reliable source. *Id.*

merators will follow-up on only a random sample of non-responding households -- just enough to ensure that, in the aggregate, 90% of the households in each census tract will have been enumerated. The Bureau will make no attempt to contact the remaining 10% (approximately 11.5 million homes), but will instead "infer" the population of these homes based on the results of the sample survey. Appellants do not claim that sampling for non-response follow-up will improve accuracy; they intend to use it to save time and money. J.A. 89, 106-08, 158-59.[8]

Appellants plan to use another form of sampling -- integrated coverage measurement ("ICM") -- to estimate the percentage of persons in each racial or ethnic group and geographic area who were likely missed or counted more than once, based on a survey of approximately 0.6% of the households in the nation. *See* J.A. 58, 93 (ICM will survey approximately 750,000 of the estimated 118 million U.S. households). The resulting adjustment factors will be used to alter the population numbers for every geographic area in the country. J.A. 92-98, 142.[9] The ICM is *not* a recount. Hundreds of thousands of people will be deleted from the census totals, and millions of imagined people who were never identified will be added, based on Appellants' presumption that all individuals with selected traits (*e.g.*, all young female, city-dwelling, African-American renters) are equally likely to participate in the census. J.A. 97.

As a last resort, the Commission has imputed information for households known to be occupied from data on nearby units. *See infra* note 69.

[8] The GAO has concluded that sampling for non-response follow-up will be *less accurate* than a complete enumeration. Report to the Ranking Minority Member, (Senate) Comm. on Governmental Affairs, *2000 Census: Progress Made on Design, but Risks Remain* 26 (July 1997).

[9] Appellants will also use sampling to determine the number of persons living in housing units mistakenly identified by the Postal Service as vacant. J.A. 87-88. The House observed below that this use of sampling has the same legal infirmities as sampling for non-response follow-up. Docket Entry ("D.E.") 19, at 18 n.13.

3. Appellants were aware that the decision to proceed with this plan without clear congressional authorization put the 2000 census in legal jeopardy, because they had previously interpreted 13 U.S.C. § 195 and the Constitution to bar the use of sampling for apportionment. *See infra* at 24-27, 31 n.42, 39 n.53. They nevertheless vowed to proceed without regard to the serious harm that the unlawful use of sampling will cause: the House will not have the information needed to lawfully reapportion its membership, and a $4 billion investment in the census will be wasted. If the census were declared unlawful after the fact, the "only recourse would be to re-conduct the census, even though doing so would come too late for the House to fulfill its duties to oversee a constitutional census every decade." J.S. App. 38a.

Congress, for its part, made exhaustive legislative efforts to compel Appellants to abandon their plan to use estimates in lieu of an actual enumeration. On June 5, 1997, Congress passed a bill that expressly reaffirmed the historical prohibition against sampling. H.R. 1469, Title VIII, 105th Cong., 1st Sess. (1997) ("Section 195 . . . states that sampling cannot be used for purposes of apportionment"). President Clinton vetoed this legislation, even though it included billions of dollars in disaster relief that the President described as "urgent[ly] need[ed]," because, among other things, it would have "permanently prohibit[ed] the Department of Commerce from using statistical sampling techniques in the 2000 decennial census for the purpose of apportion[ment]." H.R. Doc. No. 105-96, at 2 (1997).

Congress tried again. The House passed its 1998 appropriations bill for the Departments of Commerce, Justice, State and the Judiciary (which are traditionally funded in a single bill) subject to the condition that Appellants could not use the funds to design or conduct a census that used sampling to determine the population for purposes of apportionment. H.R. 2267, 105th Cong., 1st Sess. (July 25, 1997); H.R. Rep. No. 105-207 (1997). When the President asserted

that he would veto the legislation -- with the attendant shutdown of census planning and major departments of government -- a compromise was reached. Section 209(b) of the 1998 Appropriations Act, which was signed by the President, authorized "[a]ny person aggrieved" to obtain expedited judicial review of the Secretary's decision to use sampling, based upon Congress's finding that "the use of statistical sampling or statistical adjustment in conjunction with an actual enumeration to carry out the census with respect to any segment of the population poses the risk of an inaccurate, invalid, and unconstitutional census." *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 209(a)(7), 111 Stat. 2440, 2441 (1997) ("1998 Appropriations Act"). Congress further found that the House of Representatives is a party aggrieved by Appellants' program to use statistical sampling for purposes of apportionment (§ 209(d), 111 Stat. at 2482), and authorized it to sue for declaratory and injunctive relief, § 209(b), 111 Stat. at 2481.

The House of Representatives filed this action in the United States District Court for the District of Columbia because it had no other means to protect its interests, and time had run out. Unless this Court invalidates Appellants' plan to use sampling by early next year, the House will not receive the results of a lawful enumeration by January 2001, as required by 2 U.S.C. § 2a, and Representatives will not be apportioned in accordance with the results of an enumeration in time for the 2002 elections.[10]

II. THE DECISION OF THE DISTRICT COURT

The three-judge district court unanimously denied Appellants' motion to dismiss the complaint for lack of jurisdic-

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[10] *See, e.g., Oversight of the 2000 Census: Putting the Dress Rehearsals in Perspective, Hearing before the Subcomm. on the Census of the House Comm. on Gov't Reform and Oversight*, 105th Cong., 2d Sess. 84 (Mar. 26, 1998) ("*Oversight Hearing I*") (concluding that the census will "truly be imperiled" if the issue is not resolved by March 1999).

tion, and granted the House's motion for summary judgment. With respect to standing, the court held that the "inability to receive information which a person is entitled to by statute" is a cognizable injury; the House is entitled to a statement from the President "showing the whole number of persons in each State ... as ascertained under the ... decennial census" (2 U.S.C. § 2a(a)); and, if statistical sampling is unlawful or unconstitutional, "Congress will not receive information that it is entitled to receive by law." J.S. App. 17a. The court explained that it is well established that a House of Congress suffers a legally cognizable injury when it is deprived of information that it needs in aid of its legislative functions or "in conjunction with its power to judge the elections, returns and qualifications of its members," and found "no principled basis on which to conclude that the House is not similarly (if not *a fortiori*) injured when it cannot obtain information necessary to perform its constitutional apportionment function." J.S. App. 19a, 20a.

The court also concluded that the House had standing because Appellants' plan for the 2000 census threatens the House's institutional interest in its lawful composition. J.S. App. 16a, 20a-22a (citing *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187 (1972)). The court observed that, if judicial review were deferred, and the courts were to "invalidate the census in 2001 or anytime thereafter, the 'one-number' census method would require the entire enumeration to be re-conducted at a cost of $4 billion, and, more importantly, the new census would not be completed before the date that Congress is supposed to perform its constitutional duty regarding apportionment." J.S. App. 24a.

On the merits, the court held that Appellants' plan to use statistical sampling techniques to determine the population for purposes of apportionment violates the Census Act, 13 U.S.C. § 195. J.S. App. 46a-64a. The court observed that before 1976 the proviso in § 195 unquestionably prohibited the use of sampling for apportionment purposes, and the

court rejected Appellants' argument that Congress repealed the prohibition on sampling by modifying the portion of § 195 that governed the Secretary's authority to use sampling for non-apportionment purposes and rewording § 141(a) to include a generalized reference to sampling. The court concluded that the ordinary reading of the apportionment proviso in § 195, even after Congress changed it to mandate (and not just authorize) the use of sampling for non-apportionment purposes, was inconsistent with Appellants' interpretation because an exception from a command "often . . . represents a prohibition against doing" the action covered by the exception. J.S. App. 52a. That meaning was especially appropriate here because "[w]e have a prior understanding" – based on 200 years of history and the critical constitutional and political importance of the apportionment – that renders it highly unlikely that Congress would bestow such discretion on the Secretary casually, without making that intention clear in the text. *Id.* at 53a. The court also found a "striking[] absen[ce]" of any legislative history supporting Appellants' view that Congress intended to repeal the prohibition on sampling for apportionment purposes and provide Appellants with unfettered discretion on whether and how to use sampling for "the only constitutional aspect of the census." *Id.* at 53a, 62a.

SUMMARY OF ARGUMENT

In *City of New York*, this Court upheld the Secretary's decision to disregard statistical estimates of the population and use an unadjusted headcount as the basis for the 1990 census. The Court concluded that the government may legitimately narrow "the potentially divisive and complex issues associated with apportionment" by adhering to "procedural and substantive rules that are consistently applied year after year." 517 U.S. at 21. Just one year later, the Secretary unilaterally declared that he has the statutory and constitutional authority to abandon the rule against statistical sampling that has governed the census process

throughout our nation's history. This Court reserved both the statutory and constitutional questions in *City of New York*, 517 U.S. at 19 nn. 9, 11. It should now affirm the unanimous judgment of the district court.

I. The sole constitutional purpose of the census is the apportionment of the House of Representatives. Yet, Appellants contend that the House has no institutional stake in the manner in which the census is taken. They also suggest that the federal courts can never provide redress in cases and controversies between the political branches. These arguments conflict sharply with this Court's precedents.

A. It is settled that a person suffers a cognizable injury when deprived of information to which he is entitled by statute, and well recognized that Congress suffers a redressable injury when deprived of information pertinent to its official functions. Based on these principles, the district court correctly held that the House will suffer a cognizable injury if it is deprived of information – the results of an actual enumeration – to which it is entitled by statute and which it needs when considering whether to enact legislation affecting the method of apportionment and in determining the qualification of its Members. Appellants' speculation that Congress might in the future enact sham informational requirements to afford itself standing to challenge the Executive's enforcement of laws affecting the general welfare is no warrant to deny the House's standing in this case. Experience demonstrates that the courts are fully capable of distinguishing demands for information relevant to Congress's constitutional functions from disclosures compelled by Congress to achieve illegitimate ends.

B. The district court faithfully applied this Court's precedents when it concluded that the House has a concrete, institutional interest in its lawful composition. Appellants protest that the House will have 435 Members even if unlawfully composed. The integrity of the House, however, would

be harmed even more fundamentally by a misallocation of its seats than by an increase or decrease in their number.

C. The Court has relied on the strict application of Article III standing requirements to confine the judiciary within its rightful sphere and safeguard the separation of powers. The House's interests here are amply concrete and particular to satisfy Article III, and the suit presents purely legal issues of the type which federal courts traditionally resolve. According to Appellants, no private party has standing to prevent the injuries threatened by their unlawful plan for the 2000 census. The Constitution does not forbid Congress from authorizing judicial redress in these circumstances.

II. When Congress amended the Census Act in 1976, it confirmed in 13 U.S.C. § 141(a) that the Secretary has authority generally to "use ... sampling procedures" when conducting "the decennial census." The rules governing how the Secretary may use sampling are set forth in a different section, 13 U.S.C. § 195. It states that the Secretary shall use sampling to carry out his statutory duties to the extent feasible, "except for the determination of population for purposes of apportionment of Representatives in Congress." The proviso in § 195 prohibits the use of sampling for purposes of apportionment. That has been the unmistakable function of the proviso since it was adopted in 1957.

It defies common sense – and the controlling canons of construction – to suggest (as Appellants do) that Congress impliedly repealed this fundamental limitation on the Secretary's authority in 1976 by modifying the Secretary's authority to use sampling for other purposes, without a plain statement in the statute, without changing the language of the proviso, without any debate or mention in the legislative record, and without providing any standards to guide the use of statistical techniques to prevent "political tampering with the census." 56 Fed. Reg. at 33,582, 33,583 (statement of the Secretary). Congress has never given the Secretary the authority he claims today.

III. The use of statistical constructs to estimate the population for apportionment purposes is also forbidden by the Constitution, which demands an "actual Enumeration." That term had a plain meaning at the time of the ratification which excluded estimation. As Samuel Johnson instructed in 1773, to "enumerate" was to "reckon up singly." *A Dictionary of the English Language* (4th ed.).

The Framers understood the difference between counting and estimating. If they had intended to permit whichever method was thought most accurate at the time, they would have used open-ended language. The Framers' concerns, however, went beyond accuracy. They inscribed permanent and precise standards to shield the census from political manipulation. Estimating the population through statistical sampling would undermine that goal, necessitating numerous choices about demographics and methodology that can be influenced by political considerations.

History forecloses Appellants' claim that they should be permitted to rely upon statistical sampling whenever they think that it might produce a more accurate result. It has never been so. The census of 1790 only included people who could be located and identified by family name on the census rolls, even though Thomas Jefferson, who directed it, was familiar with estimation and understood that the headcount resulted in a substantial undercount of the people who were hardest to find. For 200 years, Congress has echoed the plain meaning of the text, requiring those entrusted with the census to count, not estimate, the people.

ARGUMENT

I. THE HOUSE HAS STANDING IN THIS CASE

Congress established a specific cause of action for all aggrieved persons, including the House of Representatives; eliminated any prudential barriers to suit; and provided for expedited judicial proceedings with a direct appeal to this Court because it believes that this dispute must be resolved in time to ensure a lawful census and valid reapportionment.

The district court correctly found that Appellants' plan to estimate the population instead of counting it threatens the House's concrete interests in obtaining information to which it is entitled by statute and ensuring its own lawful composition, and that judicial resolution of this legal dispute would neither give rise to a doctrine of general legislative standing nor otherwise offend the separation of powers.[11] This Court should affirm the district court's judgment.

A. The House Has A Cognizable Interest In Receiving The Information To Which It Is Entitled Under 2 U.S.C. § 2a

It is well established that the inability to receive information to which a person is entitled by law is a sufficiently concrete and particular injury to satisfy constitutional standing requirements. *FEC v. Akins*, 118 S. Ct. 1777, 1784 (1998); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449 (1989). It is equally well established that a House of Congress has the constitutional power to subpoena the production of information it needs to perform its official functions, and to enforce its subpoenas, when necessary, by fining or imprisoning contumacious witnesses.[12] The district

[11] Appellants observe (Br. 21 n.9) that Congress has not yet appropriated the funds necessary for the Commerce Department to complete the 2000 census, but they no longer assert that the possibility that Congress might withhold appropriations renders this case unripe. If the House were to postpone funding the census, there is no reason to believe that Appellants would recant their commitment to use sampling. Rather than producing a census with population figures derived from an actual enumeration, this tactic might well ensure that for the first time in the nation's history, no decennial census is conducted at all. *See Oversight Hearing II* at 86. The House would suffer harm either way.

[12] *See McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) (Senate may arrest witness who refuses to comply with subpoena for information pertinent to its investigation of Attorney General's execution of the antitrust laws); *see also Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929) (Senate may imprison individual who refuses to provide information pertinent to Senate's determination whether a Senator-elect meets the constitutional specifications for membership); *see also Buckley v. Valeo*, 424 U.S. 1, 137-38 (1976).

court correctly concluded that Congress may authorize the House instead to compel by civil suit the production of information to which the House is entitled by law, and which it needs to perform express constitutional duties.

The Census Clause imposes on Congress a unique and specific obligation to ensure that an "actual Enumeration" is taken every ten years for purposes of apportionment. Pursuant to this constitutional mandate, Congress enacted 2 U.S.C. § 2a, which requires the President to transmit to Congress a statement showing (1) "the whole number of persons in each state ... as ascertained under the ... decennial census," and (2) "the number of Representatives to which each state would be entitled" under the method of equal proportions. The House relies on these numbers to perform its duties respecting apportionment and, as "Judge of the Elections, Returns and Qualifications of its own Members" (U.S. Const. Art. I, § 5, cl. 1), to determine the size of the delegation that it will seat from each of the States.[13] Because the House needs the numbers from an actual enumeration to perform its constitutional duties, its inability to receive those numbers constitutes a cognizable injury. *Cf. Ingalls Shipbuilding v. Director, Office of Workers' Comp. Programs*, 117 S. Ct. 796, 805 (1997).

Appellants do not dispute that a House of Congress may "seek[] judicial redress in aid of its legislative functions." *See* D.E. 20, at 40 n.21 (citing 2 U.S.C. § 288b(b)); *Raines v. Byrd*, 117 S.2312, 2323 n.2 (1997) (Souter J., concurring).[14]

[13] For example, in 1870, the House determined based on the 1860 census that a Representative-elect from Virginia could not be seated, since three of Virginia's seats had been transferred to the new State of West Virginia. *See* 1 *Hinds' Precedents of the United States House of Representatives* § 318, at 194-97 (1907). The House also rejected Representatives-elect from Tennessee and California when seating them would have increased their States' representation in Congress beyond the number established by the apportionment. *See id.* §§ 314-16, at 182-90.

[14] *See also Response to Cong. Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 U.S. Op. Off. Legal

They argue that the House should not be afforded judicial redress in *this* case because (according to Appellants) (1) the House does not need the results of a lawfully conducted census to perform its constitutional apportionment function (Br. 19-20); and (2) if this Court recognizes the House's standing to enforce its statutory right to information, Congress will be able, by passing informational legislation, to vest in itself a "cognizable stake and substantial role in the execution of the laws," *id.* at 19. Neither argument has merit.

For much of this nation's history, the Executive reported the results of the actual enumeration to Congress, which then enacted specific legislation prescribing the number of Representatives to which each State was entitled.[15] This system broke down when Congress proved unable to reapportion the House based on the 1920 census. In the aftermath of that historic failure, Congress created a default mechanism under which the President would calculate the apportionment using a prescribed formula, and his calculation would have effect if Congress "fail[ed] to enact a law apportioning Representatives among the several States." Act of June 18, 1929, ch. 28, § 22(b), 46 Stat. 21, 26-27.

Counsel 68, 87-88 & n.33 (1986) (separation of powers does not prohibit a House of Congress from enforcing subpoena against an Executive official in court).

[15] *See* Act of Apr. 14, 1792, ch. 23, 1 Stat. 253; Act of Jan. 14, 1802, ch. 1, 2 Stat. 128; Act of Dec. 21, 1811, ch. 9, 2 Stat. 669. The census acts governing the 1820 through 1870 censuses explicitly required the Executive to send the results of the enumeration to Congress. Act of Mar. 14, 1820, ch. 24, § 12, 3 Stat. 548, 553; Act of Mar. 23, 1830, ch. 40, § 11, 4 Stat. 383, 387; Act of Mar. 3, 1839, ch. 80, § 11, 5 Stat. 331, 336; Act of May 23, 1850, ch. 11, § 19, 9 Stat. 428, 431-32. (The 1860 and 1870 censuses were conducted under the 1850 Census Act, which provided for automatic apportionment of the House of Representatives.) Although the 1880 through 1910 census acts did not include this requirement, Congress unquestionably used the results of those censuses to apportion the House. Act of Feb. 25, 1882, ch. 20, 22 Stat. 5, 6; Act of Feb. 7, 1891, ch. 116, 26 Stat. 735, 736; Act of Jan. 16, 1901, ch. 93, 31 Stat. 733, 734; Act of Aug. 8, 1911, ch. 5, 37 Stat. 13.

The current Census Act retains Congress's prerogative to alter the apportionment formula. *See* 2 U.S.C. § 2a(a), (b) (President's report specifies the number of Representatives to which each State "*would be* entitled" unless Congress changes the apportionment formula "by subsequent statute") (emphasis added). Thus, contrary to Appellants' argument, Congress has fully preserved its "right and *responsibility* . . . to translate the current census into a new apportionment on whatever basis it pleases." S. Rep. No. 71-2, at 3 (1929) (emphasis added); *see also* 71 Cong. Rec. 1610-11 (1929) (statement of Sen. Vandenberg).

The historical record confirms Congress's continuing need for lawfully gathered, state-level population figures. Congress adopted the current equal proportions method of apportionment for the 1942 reapportionment *after* receiving the results of the 1940 census. Act of Nov. 15, 1941, ch. 470, § 1, 55 Stat. 761-62; *see United States Dep't of Commerce v. Montana*, 503 U.S. 442, 464 & n.42 (1992). In 1981, as well, *after* receiving the President's statement, the House considered replacing the current method with the Hamilton-Vinton method, which would have shifted seats from New Mexico and Montana to California and Indiana. *Census Activities and the Decennial Census, Hearing before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 97th Cong., 1st Sess. 19 (June 11, 1981). As this Court has recognized, "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *McGrain*, 273 U.S. at 175.

Contrary to Appellants' suggestion (Br. 18), the President cannot satisfy the House's need for information by certifying a sample census to be the "decennial census of population." It is the numbers determined through a lawful enumeration – not any old numbers – that Congress requires when it considers whether to alter the method of apportion-

ment and decides who may lawfully take a seat in its chamber. Sampling will produce the wrong information and, as the district court found, Congress's "receipt of the wrong information is no less of an injury than failure to receive any information at all." J.S. App. 18a.[16]

It is well recognized that a House of Congress can sue to enforce a right to information it has sought by subpoena.[17] Appellants argue (Br. 19), however, that a House of Congress cannot be permitted to sue Executive officials to enforce a right to information that Congress has demanded by statute,[18] because that would enable Congress to "give itself a cognizable interest in the outcome of *any* Executive

[16] Appellants' unlawful program for the 2000 census has put the House "in the position of having to choose" between agreeing to the use of sampling, which it "believ[es] . . . to be unconstitutional," and failing to take the actions necessary to ensure that a census and reapportionment will be timely effectuated. *Cf. Board of Educ. v. Allen*, 392 U.S. 236, 241 (1968) (board had standing where its members were forced to choose between violating their oath to uphold the Constitution by loaning textbooks to parochial schools and violating the statute and suffering associated economic harm).

[17] *See* 2 U.S.C. § 288d(a) (authorizing Senate to bring judicial proceedings to enforce subpoenas); *United States v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976) (finding it "clear that the House as a whole ha[d] standing" to defend subpoena for information over which the Executive asserted control); *see also In re Application of U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232 (D.C. Cir. 1981) (suit by Senate, under 2 U.S.C. § 288b, to enforce subpoena for testimony on organized crime), *cert. denied*, 454 U.S. 1084 (1981); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 727 & n.3 (D.C. Cir. 1974) (suit by Senate Committee to enforce subpoenas under special jurisdictional statute).

[18] It is settled that Congress can impose statutory reporting requirements on the Executive. *See INS v. Chadha*, 462 U.S. 919, 955 n.19 (1986); *Office and Duties of Att'y Gen.*, 6 Op. Att'y Gen. 326, 344 (1854) ("Congress may at all times call on [the heads of executive departments] for information or explanation in matters of official duty"); *Duties of the Att'y Gen.*, 1 Op. Att'y Gen. 335, 336 (1820) (Congress may by legislation require Attorney General to prepare report on claims made against the United States).

Branch decision, simply by requiring executive officials to report that decision to Congress."

Contrary to Appellants' suggestion, no floodgates will open if this Court concludes that the House has standing to seek judicial redress in this case. The House has a cognizable interest in the Executive's lawful conduct in this extraordinary case because the sole purpose of the conduct, by constitutional and statutory design, is to collect information that the House needs to receive in time to perform its own explicit constitutional obligations. The speculative possibility that Congress might enact sham informational requirements in a bid to afford itself broad standing to challenge the lawfulness of Executive conduct is no warrant to deny the House's standing here. The basis of Congress's authority to compel the disclosure of information is necessity, *Marshall v. Gordon*, 243 U.S. 521, 541-43 (1917), and this Court has proven fully capable of discriminating between legitimate and illegitimate invocations of that authority in cases involving Congress's exercise of its inherent contempt power and in criminal prosecutions for contempt of Congress.[19] The Court is equally capable of delimiting, with attention to necessity and established Article III standing requirements, Congress's authority to invoke civil process to obtain information it demands by law.

Appellants' fear of legislative overreaching, moreover, is greatly exaggerated. Congress has long enjoyed the power

[19] *See, e.g., Kilbourne v. Thompson*, 103 U.S. 168 (1881) (House exceeded its authority when it imprisoned contumacious witness, because its underlying inquiry into the private affairs of individuals was "one in respect to which no valid legislation could be enacted"); *Watkins v. United States*, 354 U.S. 178 (1957) (reversing conviction for contempt of Congress, because House Committee on Un-American Activities did not establish that questions were based on a legitimate subject of legislative inquiry); *cf. Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 476-78 (1977) (distinguishing Bill of Attainder from non-punitive legislation by examining whether Congress had "legitimate justifications" for enacting the law and whether "legislative record" indicated an intent to punish).

of arrest to obtain information relevant to an investigation of the Executive Branch (see *McGrain*) or to a determination of a Member's qualification for office (see *Barry*), yet Congress has not exercised this power in over half a century. Congress ordinarily has no need to exercise self-help or afford itself a cause of action to constrain Executive conduct. Congress exercises continuing oversight, and provision of a cause of action to aggrieved private parties (with attorneys' fees and costs, if need be) effectively ensures judicial challenges to unlawful agency action. This is ordinarily true even with respect to the Executive's information-gathering obligations. *See, e.g., Akins*.[20]

B. The House Has A Cognizable Interest In Its Lawful Composition

In *Beens*, this Court held that a legislature's interest in matters that "directly affect" its lawful composition is amply personal and concrete to afford it standing under Article III. A three-judge district court had reapportioned the legislative districts of the Minnesota State Senate by, among other things, reducing the number of senatorial districts. The State Senate, which had intervened in the district court, challenged the reapportionment plan on appeal. 406 U.S. at 192. This Court concluded that the State Senate was "an appropriate legal entity for purpose of intervention and, as a consequence, of an appeal" because it was "directly affected by the District Court's orders." *Id.* at 194. The district court correctly found that the House of Representatives'

[20] In *Akins*, voters claimed that the FEC's determination that the American Israel Public Affairs Committee ("AIPAC") was not a "political committee," subject to the disclosure requirements of 2 U.S.C. § 431, deprived them of information which would help them evaluate candidates for public office. 118 S. Ct. at 1784. This Court found that the voters' allegations that the FEC had violated the law by refusing to acquire this information from AIPAC stated a cognizable informational injury under Article III. *Id.* So too here.

institutional interest in being lawfully composed similarly is "directly affected" by Appellants' sampling plan.

Appellants insist that *Beens* is inapposite because, while sampling may affect the distribution of seats in the House, it will "have no effect on the *number* of Representatives that will convene in the 108th or any subsequent Congress." Br. 22-23 (emphasis added). Appellants cannot explain why it is more injurious to have the wrong number of seats than to have the wrong allocation of seats.[21] If anything, "preserv[ing] the constitutional character" of the House by ensuring that it is not "elected out of an anticonstitutional source" is a more fundamental interest than fulfilling the statutory requirement that the House have 435 Members. S. Rep. No. 71-2, at 3. Appellants' attempt to distinguish *Beens* on this ground cannot withstand scrutiny.[22]

Appellants also protest (Br. 23) that the challenge in this case concerns the lawful apportionment of Representatives in a *future* Congress. Their suggestion that the presently constituted House is an improper plaintiff is incorrect for two reasons. First, while the House is not viewed as a continuing body for *all* purposes, *see, e.g., Gojack v. United States*, 384 U.S. 702, 706 n.4 (1966), the Constitution speaks

[21] Indeed, one of the purposes served by the actual enumeration requirement is to protect against political manipulation of the apportionment. *See* 56 Fed. Reg. at 33,583 (finding by Secretary that use of sampling to adjust the census numbers would "open the door to political tampering"); *id.* at 33,600-03; *accord* H.R. Rep. No. 104-821, at 4-11 (1996). No amount of oversight would provide the House with the same protection. The House has a strong institutional interest in the enforcement of this prophylactic rule. *Cf. Meese v. Keene*, 481 U.S. 465, 475 (1987) (the need to take affirmative steps to avoid risk of harm constitutes injury-in-fact).

[22] The Court rejected this distinction in *Beens* itself, when it drew support from *Silver v. Jordan*, 241 F. Supp. 576 (S.D. Cal. 1964) (per curiam), *aff'd mem.*, 381 U.S. 415 (1965), which, like this case, involved solely a change in composition. Although Appellants correctly observe (Br. 23 n.11) that the State Senate in *Silver* was ordered to enact legislation to change its apportionment, the Court in *Beens* did not refer to that aspect of the State Senate's legal injury.

of the "House of Representatives" as an institution, not just a fleeting succession of Congresses, and the institution is in many respects a continuing juridical entity.[23] As the district court observed, statutory provisions make clear that certain functions, such as the ownership of property, transcend the seating of a new Congress. J.S. App. 23a (citing 2 U.S.C. § 112e(b)). The 1998 Appropriations Act similarly extends a cause of action to the House, not to a particular Congress. Nothing in the Constitution prohibits Congress from extending that institutional authorization.

Even if the House were not a continuing institution for these purposes, however, the district court correctly concluded that nothing in the Constitution prevents Congress from authorizing the 105th Congress to represent the institutional interests of its successors, where, as here, complete relief cannot be obtained after the census is taken.[24] *See* J.S. App. 23a-26a (discussing third-party standing cases involving next friends and fiduciaries). Appellants' contention (Br. 25 n.12) that future Congresses may view the use of sampling differently has no weight. There is never complete assurance that a representative is pursuing the true preferences of a real party-in-interest that lacks the capacity to act on its own behalf, and the law requires no such assurance. *See Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) ("next

[23] *See Powell v. McCormack*, 395 U.S. 486, 497-500 (1969) (in a mandamus action for payment of withheld salary brought by a Representative who alleged that he was unconstitutionally denied a seat in the 90th Congress, a live controversy existed even though the 90th Congress had terminated at the time of this Court's review).

[24] There is unquestionably a serious risk that the use of sampling will eventually be invalidated. Because Appellants intend to take a "one-number" census, the only remedy for an unlawful census would be to take a new census, which would necessitate a special mid-decade reapportionment. Congress has a concrete interest in Appellants' use of time-tested census procedures that avoid the risk of such disruption. *Cf. Reynolds v. Sims*, 377 U.S. 533, 583 (1964) (limits "on frequency of reapportionment are justified by need for stability and continuity in the organization of the legislative system").

friend" must explain "why the real party in interest cannot appear on his own behalf," and must be "truly dedicated to the best interests of th[at] person"). Congress was surely within its constitutional authority in presuming that successor Congresses will share the interest of the current body in being lawfully composed (and in receiving information critical to the performance of its constitutional duties).

Finally, Appellants stress that, in contrast to *Beens*, this case "was filed by a *federal* legislative entity," which has no "capacity to sue in order to vindicate the general public and governmental interest in the execution of the laws." Br. 23. In *Beens*, however, the State Senate had standing in its own right because it was "directly affected" by the district court's reapportionment orders. 406 U.S. at 194. The House has the same concrete institutional interest in matters affecting its composition. *See Powell*, 395 U.S. at 520-21, 548.

C. Congress Did Not Violate The Separation Of Powers By Authorizing This Action

Appellants argue that, even if the House has alleged imminent injury to its concrete, particularized institutional interests, this case nonetheless is not justiciable because it is a dispute between the political Branches. That position cannot be reconciled with this Court's precedents.

The Court relies primarily upon standing principles to establish whether a matter is "appropriately resolved through the judicial process." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted); *see also Raines*, 117 S. Ct. at 2322 (defining the scope of the "restricted role for Article III courts" through principles of "personal" and "concrete injury"). It has, in addition, articulated several other considerations that bear on whether the exercise of Article III jurisdiction will impermissibly implicate separation of powers concerns. Those considerations favor review in this case. First, Congress passed and the President signed legislation specifically authorizing the Court to resolve this controversy, thereby "significantly

lessen[ing] the risk of unwanted conflict with the Legislative Branch," *Raines*, 117 S. Ct. at 2318 n.3, and "inappropriate interference in the business of other branches of Government," *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (discussing political question doctrine).

Second, the exercise of jurisdiction in this case will not "put the federal courts into the regular business of deciding [inter-branch] ... policy disputes." This is not simply a "policy dispute," nor an attempt by Congress to impinge upon the Executive's general authority to execute and enforce the law. This case presents a unique instance where the Executive's actions directly threaten concrete, particularized interests of a House of Congress. Congress has rarely authorized litigation to protect its interests, and has no authority to file suit under the myriad of general laws authorizing aggrieved persons to challenge agency action.[25] Here, however, Congress has afforded the House an express cause of action, and, if Appellants are correct that no private party can establish standing before the census is conducted, the House has no other recourse to protect its institutional interests.[26]

Third, this case presents purely legal issues of the type which federal courts "traditionally resolve." *United States v. Nixon*, 418 U.S. 683, 696 (1974). It merely subjects the legality of Appellants' program to use sampling to judicial

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[25] *See Director, Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 128 (1995) (agency official acting in governmental capacity is not a person "adversely affected or aggrieved" within meaning of statute authorizing judicial review even though he had Article III standing).

[26] *Compare Raines*, 117 S. Ct. at 2322 (reserving question whether plaintiffs would have had standing if dismissal would have "foreclos[ed] the Act from constitutional challenge"). If this Court concludes that the Appellees in *Glavin* have standing, however, the House's institutional interests will be protected, and the Court will not need to determine separately whether the House has standing in this case. *See, e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 16 (1963).

review, and puts no "additional burden" on the Executive beyond that which this Court has previously approved.[27]

Contrary to Appellants' argument, there is no bright-line constitutional prohibition on judicial resolution of intra-governmental disputes.[28] Thus, in *Chadha*, the Senate and House of Representatives intervened in the court of appeals after that court held that the legislative veto was unconstitutional, and filed petitions for certiorari naming the Executive Branch (which had sided with Chadha) as a respondent. 462 U.S. at 938. This Court observed that the "controversy may, in a sense, be termed 'political,'" *id.* at 942, but that "[r]esolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications." *Id.* at

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[27] *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (constitutionality of President's decisions concerning decennial census is subject to judicial review); *see also Clinton v. Jones*, 117 S. Ct. 1636, 1649 (1997) ("[W]e have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law"); *Morrison v. Olson*, 487 U.S. 654, 693 n.33 (1988) (finding no "constitutional problem" with provision for judicial review of Attorney General's decision to remove the independent prosecutor because "judicial review" does not "put any additional burden on the President's exercise of executive authority").

[28] *See, e.g., Ingalls Shipbuilding*, 117 S. Ct. at 805 (confirming that Congress can "confer[ ] standing" on a government official challenging actions of another governmental entity that allegedly "impair[ed] [his] ability to achieve the ... purposes and to perform the administrative duties ... prescribe[d]" by a law he had a role in administering); *United States v. Will*, 449 U.S. 200 (1980) (class action on behalf of federal judges challenging constitutionality of statute affecting judicial compensation); *United States v. Nixon*, 418 U.S. at 697 (upholding claims of special prosecutor in a dispute with the President over the disclosure of information: the "mere assertion of a claim of an 'intra-branch dispute,' without more, has never operated to defeat federal jurisdiction"); *see also Goldwater v. Carter*, 444 U.S. 996, 1001 (1979) (Powell, J., concurring) (if Congress and the President adopted "irreconcilable" legal positions, the "specter of the Federal Government brought to a halt because of the mutual intransigence of the President and Congress would require this Court to provide a resolution pursuant to our duty 'to say what the law is'").

943 (discussing political question doctrine). The Court held that the Legislature was a "proper petitioner," and that the dispute was "beyond [a] doubt" cognizable under Article III as of "Congress' formal intervention." *Id.* at 939.[29]

In *Raines*, although the Court dismissed for lack of Article III standing a facial challenge by six Members of Congress to the Line Item Veto Act, it acknowledged that a legislative body can have judicially cognizable institutional interests in certain concrete settings. 117 S. Ct. at 2319-20 (declining to overrule *Coleman v. Miller*, 307 U.S. 433 (1939)). The individual Members lacked standing because they alleged merely an abstract dilution of legislative power. 117 S. Ct. at 2318. Here, the House asserts concrete interests that do not implicate its "authority or power," have long been deemed justiciable, and are far more concrete than those found cognizable in *Chadha* and *Coleman*. *Id.* at 2321-22.[30]

II. THE CENSUS ACT FORBIDS THE SECRETARY FROM USING SAMPLING FOR APPORTIONMENT

To justify their radical departure from the way the census has been conducted for 200 years, Appellants have also

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[29] Since *Chadha*, Congress and the Executive have been adverse parties in a number of cases adjudicated in this Court. *See, e.g., Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986).

[30] Although the Court noted in *Raines* that "analogous, [historical] confrontations between one or both Houses of Congress and the Executive Branch" did not result in litigation, 117 S. Ct. at 2321, that history is not controlling here. Unlike here, the historical examples referenced all concerned injuries to "authority or power." Most involved statutory restrictions on presidential prerogatives (such as the Tenure of Office Act) that the President believed to be unconstitutional. *See Raines*, 117 S. Ct. at 2321-22. In those circumstances, the President could have prevented the injury by refusing to obey the statute. *See, e.g., Meyers v. United States*, 272 U.S. 52 (1926) (holding successor to Tenure of Office Act unconstitutional in suit brought by Postmaster who had been removed by the President in spite of the statute). In contrast, Congress cannot unilaterally prevent the injuries at issue here.

departed radically from their previous interpretation of the governing law. Initially, the Bureau concluded that the Census Act, as amended in 1976, "clearly" prohibited any use of sampling for apportionment.[31] The Solicitor General told this Court, flatly, that "13 U.S.C. § 195 prohibits the use of statistical 'sampling methods' in determining the state-by-state population totals," including to "adjust[] the December 31 figures." *Klutznick v. Young*, Application for Stay Pending Appeal to the United States Court of Appeals for the Sixth Circuit 14 n.7 (Dec. 1980) (No. A-533). After several district courts held that § 195 only prohibited sampling as a *substitute* for traditional methods of enumeration, however, the Bureau adopted the view that the statute could be read either as a complete prohibition on sampling or the more limited prohibition indicated by the court decisions.[32]

The Bureau remained skeptical. In 1993, Acting Director Harry A. Scarr testified that the Bureau might need "specific legislative changes" for the 2000 census because § 195 "allows using sampling techniques except for determining the population for purposes of apportion[ment]."[33] Later

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[31] *See* United States Dep't of Commerce, *Census Undercount Adjustment: Basis for Decision*, 45 Fed. Reg. 69,366, 69,372 (1980) ("Title 13 clearly continues the constitutional mandate and historical precedent of using the 'actual Enumeration' for purposes of apportionment, while eschewing estimates based on sampling or other statistical procedures, no matter how sophisticated"); *see also Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich. 1980), *rev'd*, 652 F.2d 617 (6th Cir. 1981), *cert. denied sub nom., Young v. Baldrige*, 455 U.S. 939 (1982); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980); *Carey v. Klutznick*, 508 F. Supp. 404 (S.D.N.Y. 1980), *rev'd*, 653 F.2d 732 (2d Cir. 1981), *cert. denied*, 455 U.S. 999 (1982); *Orr v. Baldrige*, (S.D. Ind. 1985), Cause No. 1F 81-604-C, D.E. 19, Exh. 3.

[32] *See, e.g., Problem of Undercount in 1990 Census, Hearing before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess. 22 (July 14, 1987).

[33] *Review of Major Census Bureau Programs in 1993, Hearing before the Subcomm. on Census, Statistics, and Postal Personnel of the House Comm. on Post Office and Civil Service*, 103d Cong., 1st Sess. 14 (Mar. 2, 1993).

that year, Scarr announced that the Bureau was planning a "historic departure from 200 years of census-taking" by "combining counting and estimation," and reiterated his "personal belief" that the Bureau might need legislation to permit it to implement that plan.[34] The Bureau ultimately abandoned any attempt to obtain authorizing legislation, however, instead choosing to rely on a Department of Justice opinion that § 195 prohibits sampling only when used as a substitute for traditional methods of enumeration.[35]

After this litigation began, Appellants adopted a far more radical theory. They now assert that § 195 prohibits nothing, and instead gives the Secretary complete discretion to determine the population for apportionment purposes by means of statistical sampling. Remarkably, Intervenors Gephardt, *et al.*, maintain that this new interpretation -- flatly inconsistent with the views expressed by Appellants on dozens of occasions over a 17 year period and the unanimous decisions of two three-judge panels -- is *required* by the *plain language* of the Census Act.[36]

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[34] *Review of the Status of Planning for the 2000 Census, Hearing before the Subcomm. on Census, Statistics, and Postal Personnel of the House Comm. on Post Office and Civil Service*, 103d Cong., 1st Sess. 809 (Oct. 7, 1993).

[35] *See* J.A. 136; Mem. for the Solicitor General from Walter Dellinger, Ass't Attorney General 9-14 (Oct. 7, 1994) ("Dellinger Mem."), D.E. 19, Exh. 7; *see also* Letter from Stuart M. Gerson, Ass't Attorney General, Civil Div., to the Hon. Wendell L. Willkie, II, General Counsel, United States Dep't of Commerce 18 (July 9, 1991) ("Gerson Letter"), D.E. 19, Exh. 1 ("Section 195's sampling provision is subject to two divergent interpretations": (1) "that Section 195, on its face, prohibits statistical adjustment"; or (2) "that a statistical adjustment ... carried out as a substitute for a headcount could violate Section 195").

[36] Although several Intervenors claim that Appellants' current interpretation is due deference under *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), Appellants themselves -- correctly -- do not even cite *Chevron*. Their current stance has all the earmarks of a "position established only in litigation ... developed hastily, or under special pressure," and therefore undeserving of deference. *National Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997) (citation omitted). In any event, the 1998 Appropriations Act makes clear Congress's intent that this Court (and not Appellants) resolve any ambiguity in the 1976 legislation. *Compare Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996). Moreover, *Chevron* itself confirms that Congress presumes that the courts must first exhaust the "traditional tools of statutory construction," and that deference is inappropriate where, as here, traditional means of interpretation yield "clear congressional intent." 467 U.S. at 843 n.9. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 923 (1995) (refusing to defer where Justice Department's interpretation would raise a serious constitutional question); *accord Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577 (1988); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

Under Appellants' current interpretation, nothing in the Census Act would prevent the Secretary from sampling as few as 20% of the population, using methods that provide no safeguards against political manipulation, and choosing to use sampling in some decennial censuses but not others based upon undisclosed policy (or political) objectives. Given the enormous complexity and discretion involved in the design and application of such a program,[37] the Secretary's decisions could have an enormous impact on the apportionment of Representatives in Congress. There is no basis in the text, traditional canons of construction, or common sense to believe that Congress has allowed that to occur.

A. The Census Act Can Only Reasonably Be Read To Forbid Sampling For Apportionment

Appellants criticize the district court for focusing principally on § 195 -- the section that specifically addresses the use of sampling for apportionment -- and for applying traditional canons of construction to confirm its meaning. In Appellants' view, this case begins and ends with the general language of 13 U.S.C. § 141(a). Appellants are mistaken.

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[37] *See, e.g.*, United States Bureau of the Census, *Assessment of Accuracy of Adjusted Versus Unadjusted 1990 Census Base for Use in Intercensal Estimates: Report of the Comm. on Adjustment of Postcensal Estimates* 5 (Aug. 7, 1992) (1990 sampling program "was a very complex process that combined elements of survey design, interviewing, matching, imputation, mathematical modeling and professional judgment").

The district court correctly took instruction from the more specific provision and correctly viewed that provision in its statutory and historical context.

1. Section 141(a) provides in relevant part as follows:

> *The Secretary shall*, in the year 1980 and every 10 years thereafter, *take a decennial census of population* as of the first day of April of such year, which date shall be known as the "decennial census date", *in such form and content as he may determine, including the use of sampling procedures* and special surveys. (Emphasis added).

Appellants' entire argument hinges on the proposition that the italicized language constitutes a specific and unambiguous authorization to use sampling to determine the population for purposes of apportionment. The proposition, however, is untrue.

To begin with, § 141(a) is not targeted specifically to determining the population for apportionment purposes. Section 141(a) authorizes and directs the Secretary to take the "decennial census of population." In addition to the population counts used for apportionment, the term "census of population" is expressly defined to include a myriad of demographic information concerning "population, housing, and matters relating to housing." 13 U.S.C. § 141(g). Since 1940, the Secretary has collected the vast bulk of this statistical data by surveying a sample of U.S. households with an expanded "long form" questionnaire. Bureau of the Census, *200 Years of Census Taking: Population and Housing Questions, 1790-1990*, at 4, 98 (Nov. 1989).[38] The reference to

[38] The 1990 "census of population" comprised 45 distinct items of information, ranging from occupation and income to primary language and level of education. Bureau of the Census, *Official 1990 U.S. Census Form*. In 2000, "the long form will ask the same 7 questions that appear on the short form, plus questions on an additional 27 subjects that are either specifically required by law to be included in the census or are required to implement other federal programs." J.A. 85-86.

"sampling" in § 141(a) acknowledges the Secretary's continuing authority to use sampling for those purposes.

Second, the reference to sampling and special surveys in § 141(a) is limited by other, more specific provisions of the Act. Appellants accept that § 193 – not § 141(a) – governs the use of special surveys, and that § 193 limits these surveys to the collection of "preliminary and supplemental statistics." 13 U.S.C. § 193.[39] Appellants also concede that § 195 – not § 141(a) – governs the Secretary's "use of sampling" to collect all information other than the population count used for apportionment, and that § 195 *requires* the Secretary to use sampling for these purposes "if he considers it feasible." 13 U.S.C. § 195. Accordingly, the district court quite reasonably looked to § 195 for specific guidance on the use of sampling to determine the population for apportionment purposes. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989) ("A statutory general rule usually does not govern unless there is no more specific rule"). Seemingly broad general grants of authority are commonly subject to specific limitations found elsewhere in a statute,[40] and, as between § 141(a) and § 195, the latter is "clearly the more specific." J.S. App. 61a. Whereas § 141(a) references the Secretary's "authority to conduct the entire decennial census," § 195 addresses "when sampling may be used (and when it may not)," and directly addresses the use of sampling for purposes of apportionment. J.S. App. 62a.

Appellants in effect argue (Br. 31) that, because § 195 governs the Secretary's authority to use sampling for all other purposes, § 141(a) *must* be interpreted to afford the

[39] The Bureau concedes that the Secretary may not use special surveys as the basis for apportionment. *See Oversight Hearing I* at 69.

[40] *See, e.g., United States v. Giordano*, 416 U.S. 505, 512-14 (1974) (specific provision regarding wiretaps limits Attorney General's broad authority to delegate responsibilities); *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) (specific provisions regarding arrests of bankrupts limit broad power granted to Bankruptcy Courts).

Secretary unqualified discretion to use sampling for apportionment purposes so that the reference to sampling in § 141(a) will retain *some* independent meaning. Appellants correctly discern that adherence to the specific instructions in § 195 renders § 141(a)'s illustrative reference to sampling of no substantive import, but this merely reflects Congress's modest intentions. When Congress added the phrase "in such form and content as he may determine, including the use of sampling procedures" to § 141(a), it did not intend to imbue the Secretary with new authority over methodology. The Secretary was already authorized by § 5 to "determine the number, form, and subdivisions" of the questionnaires used in the census, Act of Aug. 31, 1954, ch. 1158, § 1, 68 Stat. 1012, 1013, and was already authorized by §§ 193 and 195 to use special surveys and sampling techniques, Act of Aug. 28, 1957, Pub. L. No. 85-207, § 14, 71 Stat. 481, 484 (1957). The phrase added in 1976 references this existing authority – a purpose which amply satisfies the law's desire to attribute to all language some statutory purpose.[41]

Appellants' insistence that Congress must have intended the reference to sampling in § 141(a) to carry independent force is conclusively refuted by § 141(d). Subsection (d) provides in relevant part that "the Secretary, in the year 1985 and every 10 years thereafter, shall conduct a mid-decade census of population *in such form and content as he may determine, including the use of sampling procedures and special surveys.*" 13 U.S.C. § 141(d) (emphasis added). If the italicized language – the same as that in subsection (a) – were interpreted to vest the Secretary with unqualified discretion to determine how sampling will be used in the

[41] *See Walters v. Metropolitan Educ. Enters.*, 117 S. Ct. 660, 665 (1997) ("[T]he 'mere' elimination of evident ambiguity is ample – indeed, admirable – justification for the inclusion of a statutory phrase"); *United States v. Naftalin*, 441 U.S. 768, 778 (1979) (though statutory provisions are interpreted so as to avoid surplusage, "that there may well be some overlap is neither unusual nor unfortunate") (citation omitted).

mid-decade census, the provision would conflict with § 195; because the information obtained in a mid-decade census cannot be used for apportionment (*see* 13 U.S.C. § 141(e)(2)), § 195 already *requires* the Secretary to use sampling in the mid-decade census whenever he considers it feasible. To preserve statutory harmony, therefore, the phrase in subsection (d) – and the identical phrase in subsection (a) – must be read merely as a general reference to authority that is spelled out in greater detail in § 195.

2. Section 195 states that the Secretary "shall, if he considers it feasible, authorize the use of . . . 'sampling" in carrying out his statutory duties, "*except for the determination of population for purposes of apportionment of Representatives in Congress.*" 13 U.S.C. § 195 (emphasis added). Appellants argue that the proviso in § 195 merely excepts the constitutional count from the statutory rule that governs the use of sampling for all other purposes, and that the Court must look back to the general language of § 141(a) to understand the scope of the Secretary's authority to use sampling for apportionment purposes. This argument is implausible on its face.[42] If Congress had intended after 200 years to authorize the Secretary to use population estimates in lieu of counting the people, it would have made that intention manifest. Read in its statutory and historical context, the meaning of the proviso in § 195 is plain: Congress has precluded the Secretary from estimating the population

[42] Before this lawsuit, the Bureau, the Secretary, the Justice Department, and virtually every court that had interpreted the proviso read it to convey a prohibition. *See supra* at 24-27. Mem. from John M. Harmon, Ass't Attorney General, Office of Legal Counsel, to Alice Daniel, Ass't Attorney General, Civil Div., at 3. (Sept. 25, 1980), D.E. 19, Exh. 6 (distinguishing between permissible "adjustment" and "sampling," which is prohibited by § 195); Gerson Letter, at 8 ("An argument that adjustment is *barred* begins with the prohibition found in Section 195"); Dellinger Mem., at 10 (analyzing "scope" of "section 195's prohibition on the use of 'sampling'"). Only one district court judge has adopted Appellants' contrary interpretation (over Appellants' objections). *See City of Philadelphia*, 508 F. Supp. at 679.

for purposes of apportionment, just as it has done in every Census Act since 1790.

Appellants no longer dispute that, as a matter of ordinary usage, the syntax of § 195 – an exception from a command to do "X" – can convey either a prohibition against doing "X" or a delegation of discretionary authority to do "X" with respect to the subject matter of the exception. Br. 29 n.15. Appellants also assert that the meaning of this type of proviso depends on whether it is likely that the treatment of the excepted class would have been committed to the discretion of the party addressed, which must be gleaned from background knowledge and context. *Id.* Appellants, however, insist that in this case the "operative" and exclusive "background rule" is § 141(a). *Id.* There is no reason – other than a desire to reach (or avoid) a particular end result – to return immediately to the general (and inconclusive) language of § 141(a) and abandon so quickly the attempt to discern, through statutory context and background, the meaning of the more specific proviso in § 195.[43]

a. Taking into account statutory context and the significance to Congress of the constitutional enumeration, it is exceedingly unlikely that Congress would have delegated to the Secretary unqualified discretion over the use of statistical sampling without enacting a plain statement to that

[43] Intervenors City of Los Angeles, *et al.*, make the same error. They suggest that the district court's metaphor for § 195 – "Except for my grandmother's wedding dress, you shall take the contents of my closet to the cleaners" – is incomplete. In their view, a complete wedding dress analogy would include a parallel to § 141(a), which would state: "You have discretion to take my grandmother's wedding dress to the cleaners." Br. 19. To the extent that an analogy to § 141(a) may be helpful, this one is plainly flawed. Section 141(a) does not state that "the Secretary has discretion to use sampling to determine the population for purposes of apportionment." A better analogy might read as follows: "You shall clean and organize the closet in such manner as you may determine, including sending clothes to the cleaners." Nothing in this version of § 141(a) could reasonably be read to override the prohibition in § 195 against taking grandmother's wedding dress to the cleaners.

effect. Whether the people will be counted for purposes of apportionment, or instead estimated through sampling, is a fundamental decision that involves not only census accuracy, but also unique policy issues relating, *inter alia*, to maintenance of public faith in and acceptance of the apportionment process, and the potential for political manipulation. *See, e.g., City of New York*, 517 U.S. at 11-12. *See supra* at 19-21. Congress would not have delegated this decision casually, and should not be deemed to have done so inadvertently.

Where the Census Act permits the Secretary to use sampling, it provides standards. Section 195, as noted, requires the Secretary to use sampling for purposes other than apportionment when "he considers it feasible." 13 U.S.C. § 195. Section 181 allows the Secretary to use sampling to collect annual population figures when he "determines [sampling] will produce current, comprehensive, and reliable data." 13 U.S.C. § 181(a). If Congress believed it necessary to guide the Secretary's decisions respecting sampling for these purposes, it is implausible that Congress would have left it entirely up to the Secretary to decide whether to use sampling for purposes of apportionment.[44]

b. Appellants are unable to provide a plausible alternative explanation of why Congress would have excepted the apportionment count from § 195's mandate. They suggest that Congress intended to permit the Secretary, with respect to apportionment, to determine "what measures will

[44] Indeed, this would raise serious issues of undue delegation. *See National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974). Although Congress may delegate power under broad general directives, it must "clearly delineate[] the general policy" and supply an "intelligible principle" to guide an agency's decision-making processes. *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989). The Census Act, however, contains no "intelligible principle[s]" to guide the Secretary in making the numerous discretionary decisions that he would have to make to determine whether, and if so, how, to conduct sampling. The absence of a plain statement effecting so broad and momentous a delegation of authority suggests that no such delegation was intended.

ensure the most accurate population figures practicable." Br. 30; *accord* Gephardt Br. 21 (because the Bureau had not yet perfected sampling-based adjustment procedures in 1976, Congress might have decided to leave the "judgment call" to "the 'experts'"). This explanation does not withstand scrutiny. In the context of apportionment, the feasibility standard established in § 195 would surely be broad enough to permit the Secretary to insist upon the use of the method that will produce "the most accurate population figures practicable." *See* Appellants' Br. 28 n.14 (the Secretary "retains meaningful discretion" to determine whether sampling should be employed"). No special exception would have been needed.

c. The implausibility of Appellants' contention that Congress casually delegated to the Secretary the unfettered authority to use sampling for apportionment purposes is even more apparent when framed in historical context. As of 1976, when Congress enacted the language on which Appellants rely, Congress had prohibited census takers from using statistical estimates to fulfill this important constitutional function for 186 years.

The First Congress implemented that prohibition in 1790 by requiring census takers to make an "enumeration" of every person within their districts, and to record each person on a schedule by family name. Act of Mar. 1, 1790, ch. 2, 1 Stat. 101, 103. The Act of March 26, 1810 continued the prohibition by requiring the enumeration to be made "by an actual inquiry at every dwelling house, or of the head of every family within each district, *and not otherwise*." Ch. 17, 2 Stat. 564, 565 (emphasis added). This injunction was repeated in substantially the same form in the acts that governed each of the following 14 censuses.[45] In 1954, when

[45] Acts of Mar. 23, 1830, ch. 36, 4 Stat. 383, 384, and Mar. 3, 1839, ch. 80, 5 Stat. 331, 332. The Act that governed the seventh, eighth, and ninth censuses required the census takers to make "a personal visit to each dwelling house" and ascertain responses "by inquiries made of some member of each family" or "the agent of such family." Act of May 23, 1850, ch. 11, § 10, 9 Stat. 428, 430 (as amended by the Act of Aug. 30, 1850, ch. 43, 9 Stat. 445). The Acts that governed the following eight censuses afforded similar instructions. *See* Act of Mar. 3, 1879, ch. 195, § 8, 20 Stat. 473, 475, as amended by Act of Apr. 20, 1880, ch. 57, 21 Stat. 75; Act of Mar. 1, 1889, ch. 319, § 9, 25 Stat. 760, 763; Act of Mar. 3, 1899, ch. 419, § 12, 30 Stat. 1014, 1018; Act of July 2, 1909, ch. 2,§ 12, 36 Stat. 1, 5; Act of Mar. 3, 1919, ch. 97, § 12, 40 Stat. 1291, 1296; Act of June 18, 1929, ch. 28, § 5, 46 Stat. 21, 22 (which governed the fifteenth, sixteenth, and seventeenth censuses).

the current Census Act was codified, 13 U.S.C. § 25(c) required enumerators to obtain "every item of information and all particulars required for any census" by personal inquiry of each household (or, failing that, from a neighbor). Act of Aug. 31, 1954, ch. 1158, 68 Stat. 1012, 1015.

Congress amended the Census Act in 1957 at the behest of the Secretary of Commerce. The Secretary believed that "some of the information which is desired in connection with a census could be secured efficiently through a sample survey," but he was uncertain of his legal authority to derive any census information through sampling.[46] Accordingly, Congress enacted § 195, which provided that:

> *[e]xcept for the determination of population for apportionment purposes*, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

Pub. L. No. 85-207, 71 Stat. 481, 484 (emphasis added). This provision accomplished two tasks, each unequivocally: It authorized the Secretary, as a general matter, to use sampling techniques to collect information; and it prohibited the

[46] *Amendment of Title 13, United States Code, Relating to Census: Hearing before the House Comm. on Post Office and Civil Service*, 85th Cong., 1st Sess. 4, 7 (June 19, 1957). The Secretary observed, *inter alia*, that it had "generally been held that the term 'census' implie[d] a complete enumeration." *Id.*

Secretary from using sampling to determine the population for purposes of apportionment.[47]

Appellants contend that the proviso in § 195 did not itself constitute a "freestanding" prohibition, but merely indicated sampling for apportionment purposes was still prohibited by § 25(c). Br. 34. This theory gets Appellants nowhere. Appellants agree that, when enacted, the proviso in § 195 was an express affirmation of Congress's intent to continue that prohibition. Irrespective of whether the proviso in § 195 was a "freestanding" prohibition when it was enacted, it clearly was a freestanding prohibition after Congress eliminated § 25(c) in 1964 to permit the Bureau to take the census by mail.[48] *See* Pub. L. No. 88-530, 78 Stat. 737 (1964); H.R. Rep. No. 88-373 (1964). Appellants do not contend that the 1964 legislation authorized sampling, an interpretation that would render the proviso at that time meaningless.[49]

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[47] *See also* H.R. Rep. No. 85-1043, at 10 (1957) (while § 195 permits the Secretary of Commerce to "authorize the use of the statistical method known as sampling in carrying out" his statutory duties, it "*does not* authorize the use of sampling procedures in connection with apportionment of Representatives.") (emphasis added); *accord* S. Rep. No. 85-698, at 3 (1957).

[48] The enactment of Section 195 itself addressed (insofar as the statute was concerned) the Secretary's concern that the term "census" precluded the use of sampling. *See supra* note 46.

[49] Intervenors Gephardt, *et al.*, argue that Congress had no intent in 1957 to bar the Secretary from using sampling techniques to "adjust" the population numbers used for apportionment. *See, e.g.*, Br. 16, 22-23. The lawfulness of sampling used solely for purposes of adjustment is not presented in this case because, in lieu of a complete enumeration, Appellants plan to take only a sample survey of those households that fail to respond by mail. In any event, Intervenors -- who otherwise claim the mantle of plain language -- do not even attempt to ground their special plea for sampling-based "adjustment" on the text of the Act. Nor can they. Appellants concede that their plan "uses sampling" to derive the final census numbers. J.A. 83, 85, 92-93, 123. The proviso in § 195 either forbids the Secretary to use sampling in determining the population for apportionment purposes, or it leaves the decision whether and how to use sampling for apportionment entirely within the Secretary's discretion. The words permit no intermediate position.

In 1976, Congress amended the second clause of § 195, changing "may where . . . appropriate" to "shall if . . . feasible," but left the proviso in the first clause substantively intact. Appellants argue that the modification of the Secretary's discretion to sample for other purposes (by implication) changed the meaning of the proviso, eliminating the long-standing prohibition against using sampling for purposes of apportionment. It borders on the absurd to suggest that Congress would enact such a momentous change in such an oblique fashion.[50]

Although Congress has permitted, even required, the use of sampling techniques to collect information respecting the nation's population and housing, it has since 1790 required that the constitutional aspect of the census be taken as an actual count of identified people.[51] When Congress

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[50] Intervenors argue that reading the 1976 amendments in this fashion would be consistent with Congress's "tradition" of encouraging innovation in the census and Congress's "tradition" of affording the Secretary with increasing discretion over the census process. *See* Gephardt Br. 9-10, 31; Cal. Legis. Br. 22, 28-29. These arguments are without merit. While Congress has delegated the Secretary greater authority over the course of time, the 1976 amendments actually constrained the Secretary's authority in several respects. *See, e.g.*, Act of Oct. 17, 1976, Pub. L. 94-521, §§ 141(f), 181(b), 195, 90 Stat. 2459, 2462-64 (1976). Moreover, when Congress amended the Census Act prior to 1976 to afford the Secretary authority to use new census methods -- as it did in 1957 to authorize the use of sampling for non-apportionment purposes and in 1964 to permit use of the mails -- it did so expressly and after protracted legislative debate. *See infra* at 42-44.

[51] Appellants observe (Br. 48-49 & n.29) that the Bureau deviated from this tradition in 1970, when it became aware late in the process that a substantial number of dwelling units had been erroneously classified as vacant, and that enumerators had missed a substantial number of households for which the Postal Service had current addresses. Lacking the time and funds to correct these errors by recanvassing all of the affected housing units, the Bureau inferred the number of persons missed from sample surveys (*see* 45 Fed. Reg. at 69,373-74), adding 1,553,000 persons to the overall count. *See* United States Dep't of Commerce, *The Effect of Special Procedures to Improve Coverage in the 1970 Census* 11-16 (GPO 1974). The then-Associate Director for Statistical Standards and Methodology testified that this made the Bureau "uneasy," because the Bureau

authorized the use of sampling in § 195 to collect supplemental data, it made that authorization express and specifically excepted the determination of the population for purposes of apportionment. If Congress had intended in 1976 to permit sampling for apportionment purposes, there is every reason to expect that Congress would have made that authorization equally express. Congress's re-enactment of the proviso without substantive change can only reasonably be read to continue the prohibition against sampling for this purpose. Appellants' "statutory argument would require [this Court] to assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 262 (1994).

The absence of plain language to support their argument is fatal to Appellants' position in this case. This Court has often stated that "[i]t is not lightly to be assumed that Congress intended to depart from a long established policy." *See, e.g., United States v. Wilson*, 503 U.S. 329, 336 (1992) (Thomas, J.) (quoting *Robertson v. Railroad Labor Bd.*, 268 U.S. 619, 627 (1925)). Where Congress has "firmly established" a policy over time, the Court presumes, absent a plain statement otherwise, that Congress intended to continue that policy in subsequently enacted legislation. *See United States v. Sweet*, 245 U.S. 563, 571 (1918); *accord Chisom v. Roemer*, 501 U.S. 380, 396 (1991); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 785-88 (1981).[52] This presumption takes on special force

understood that it was "not supposed to use sampling [in that manner] for the basis of the apportionment counts." *See* Gerson Letter at 15. The Bureau's use of sampling in 1970 was an anomaly, occasioned by exigent circumstances, not a meaningful departure from tradition. *See City of New York*, 517 U.S. at 21-22.

[52] Indeed, the Court has applied this maxim in cases where the statutory language was *far* clearer than the text at issue here *See, e.g., Robertson*, 268 U.S. at 622, 627 (construing statute allowing Railroad Labor Board to invoke the aid of "any District Court of the United States" to compel the attendance of a witness as referring to any district court in

where, as here, the departure from long established policy would implicate "traditionally sensitive areas," such as the distribution of political power, *see United States v. Bass*, 404 U.S. 336, 349 (1971) (construing statute to avoid upsetting the federal-state balance); *see also Public Citizen*, 491 U.S. at 466 (construing statute to avoid having to decide constitutional issues that "concern the relative powers of the coordinate branches of government"), and raise grave constitutional doubts. *Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1228 (1998).[53] In the circumstances of this case, an insistence upon plain language is essential to "assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bass*, 404 U.S. at 349.[54]

B. The Legislative History Confirms That Congress Had No Intent To Eliminate The Prohibition Against Sampling For Apportionment

The 1976 amendments were the product of numerous hearings over the course of many Congresses. Yet there is

whose district the witness lives or can be found, in light of Congress's historical reluctance to grant nationwide jurisdiction to district courts).

[53] The Bureau itself previously concluded that sampling is unconstitutional. *See* 45 Fed. Reg. at 69,372. Several Intervenors and *amici* suggest that the doctrine of constitutional doubt argues in favor of interpreting the Act to permit sampling, because (they assert) the Constitution may require the Secretary to use the most accurate method practicable. This argument has no weight. Even assuming that Appellants' sampling methodologies would produce a more accurate distributive result, this Court held in *City of New York* that the Constitution does not require the government to "conduct a census that is as accurate as possible." 517 U.S. at 17.

[54] Intervenors' reliance (Br. 12) on *Morales v. Trans World Airlines*, 504 U.S. 374 (1992), and *Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980), is also unavailing. These cases merely hold that silence in the legislative history will not prevent the Court from adopting the "obvious" (*Harrison*, 446 U.S. at 592) or "natural" (*Morales*, 504 U.S. at 385 n.2) interpretation of a statute. Neither case suggests that historical context cannot inform the meaning of ambiguous language.

no dispute that there was never *any* discussion, debate, or mention of a proposal to repeal the long-standing prohibition on the use of sampling for purposes of apportionment and to delegate unlimited discretion to the Secretary to determine the population on the basis of estimates. It is inconceivable that Congress could have repealed the primary statutory limitation on the Secretary's discretion to conduct the constitutional census without leaving a trace of that decision in the legislative record, *see Chisom*, 501 U.S. at 396 & n.23 (likening Congress's silence in similar circumstances to "the dog that did not bark"); *Green*, 490 U.S. at 527 (looking to legislative history to confirm "that what seems to us an unthinkable disposition . . . was indeed unthought of") (Scalia, J., concurring in the judgment), and without Appellants – who participated actively in the amendment process – realizing that sampling for apportionment purposes no longer "remained prohibited," J.S. App. 50a (citing 45 Fed. Reg. 69,366, 69,371-73 (1980)). In fact, the detailed legislative history of the 1976 Act explains the changes to §§ 141(a) and 195 in terms that refute Appellants' contention that Congress intended to effectuate any such repeal.

1. The primary purpose of the 1976 amendments "was to provide for a mid-decade census to be used for various purposes (not including apportionment)." *Franklin*, 505 U.S. at 817 n.16 (Stevens, J., concurring in the judgment). The legislation also addressed concerns that the Bureau was requiring the citizenry to answer too many questions in the decennial census. *See* H.R. Rep. No. 94-944, at 5 (1976).[55] Congress addressed this burden (and expense) by adding § 141(f) to require the Secretary to submit the questions to Congress in advance of the census; by amending § 195 to require the Secretary to collect data through sampling

[55] Although the Secretary progressively made greater use of sampling, the "short form" used in 1970 still required every household to disclose 20 different items of information in addition to the basic headcount. *200 Years of U.S. Census Taking* at 83, 86.

"whenever feasible," except for purposes of apportionment; and by emphasizing that authority by referencing it in § 141(a) and (d).

Appellants reject this straightforward explanation of the modest changes made to the decennial census in 1976. They insist that Congress established *two* new rules governing the use of sampling: (1) a permissive rule authorizing the Secretary to use sampling for apportionment in his discretion; and (2) a mandatory rule requiring the Secretary to use sampling for non-apportionment purposes "whenever feasible." The Committee Reports and debates, however, uniformly refer to the adoption of a single new rule governing sampling: a *directive* to encourage the use of sampling whenever feasible – a change that pertains exclusively to the use of sampling for non-apportionment purposes. The House and Senate committee reports both state that the "purpose" of the legislation with respect to sampling is to "*direct*[] the Secretary" to use sampling instead of "enumeration" whenever "feasible." H.R. Rep. No. 94-944, at 2; S. Rep. No. 94-1256, at 2 (1976) (emphasis added).[56] The Conference Report further explains that the new language in § 195 only "differs" from the prior version in one respect: the section previously "grant[ed] the Secretary discretion to use sampling when it [wa]s considered appropriate," and the new version "strengthens congressional intent that, whenever possible, sampling *shall* be used." H.R. Conf. Rep. No. 94-1719, at 13 (1976) (emphasis added).[57] These explanations make it crystal clear that Congress only intended to change the standard governing the use of sampling for non-apportionment pur-

[56] Five legislative purposes are identified. Granting the Secretary discretion to use sampling for apportionment is not among them. S. Rep. No. 94-1256, at 1; H.R. Rep. No. 94-944, at 2-3.

[57] *See also* H.R. Rep. No. 94-944, at 6 (the Act "revises Section 195 of title 13 which presently authorizes, but does not require, the use of sampling. This clarifies congressional intent that, wherever possible, sampling *shall* be used") (emphasis added).

poses, and had no intent to alter the meaning of the proviso forbidding the use of sampling for apportionment. As the Conference Report confirms, the amendment to § 195 "require[s] . . . the use of sampling procedures . . . whenever [the Secretary] deems it feasible, except in the apportionment of the U.S. House of Representatives." *Id.*

Nor can Appellants find any support for their claim of a newly-created delegation of authority to use sampling for apportionment in the explanation of the changes to the language of § 141(a). At the time, Appellants stated that this amendment merely represented a "rewording" of the existing law -- a characterization that corresponds to the House's view that § 141 was not a grant of new authority. *Mid-Decade Census Legislation, Hearing before the Subcomm. on Census and Statistics of the Senate Comm. on Post Office and Civil Service*, 94th Cong., 2d Sess. 24 (July 29, 1976) (*"1976 Senate Hearing"*). Similarly, the Conference Report states that § 141(a), as revised, is "*essentially the same* as the provisions of existing law, except that a *reference* is made (as in the case of the mid-decade census) to the use of sampling procedures and special surveys." Conf. Rep. No. 94-1719, at 11. (emphasis added).[58] As the district court observed, J.S. App. 63a, "it strains credulity to translate the statement 'reference is made . . . to the use of sampling procedures' into 'sampling procedures may now be used' . . . for congressional apportionment, thereby abandoning the long-standing methodology by which we count people.'"

2. Despite this history, Intervenors contend that

[58] The Senate Report states that the new language was "added at the end of the subsection to *encourage* the use of sampling and surveys in the taking of the decennial census," confirming that its purpose was to promote the use of existing authority, not to convey new authority to conduct the constitutional enumeration by sample survey. S. Rep. No. 94-1256, at 4 (emphasis added). The House Report never even mentions the rewording of § 141(a) despite a detailed "Section Analysis" of many minor changes. H.R. Rep. No. 94-944, at 5-6 (detailing no less than 16 changes to title 13 including substitution of "questionnaires" for "schedules").

"Congress was well aware" of the Bureau's anomalous use of statistical sampling in the 1970 census, approved of that violation of § 195, and included amendments to the Act in 1976 "to conform more properly and closely to the current language and practices used by the Bureau of the Census." Gephardt Br. 30-31 & n.20 (citing S. Rep. No. 94-1256). The Senate Report, however, specifically identifies the "technical changes" proposed for the purpose of "conform[ing] . . . the current language" of the Act to the "practices used by the Bureau of the Census." S. Rep. No. 94-1256, at 6. The amendments to §§ 141(a) and 195 are not described in those terms.[59] Nor is there any suggestion in any of the hearings, reports, or debates that the 94th Congress, which enacted the amendments at issue, had any knowledge whatsoever of the Bureau's limited use of sampling under exigent circumstances six years earlier. *See supra* at 42-44. *See generally* Brief of Washington Legal Foundation, *et al.* ("WLF Br").

Intervenors also suggest that perhaps no one in Congress mentioned that it was eliminating the prohibition on sampling in 1976 because members of Congress at that time would not have viewed the use of sampling for apportionment as "important or controversial." Gephardt Br. 12. We know, however, that issues with any potential to affect apportionment captivated the attention of Congress then as well as now: concerns about possible "use of mid-decade census statistics for congressional apportionment and districting" prevented passage of legislation authorizing a mid-decade census for more than a decade. *See* H.R. Rep. No. 94-944, at 17; *Proposals for a Mid-Decade Census, Hearing before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 94th Cong., 1st

[59] *See* S. Rep. No. 94-1256, at 3-7 (describing in detail six separate amendments designed to conform the language to Bureau practices). *See also 1976 Senate Hearing* at 24-32 (letter from Appellants identifying sections of the bill – which do not include the amendments to §§ 141(a) or 195 – that will conform the language of the Act to the Bureau's practices).

Sess. 3 (May 16, 1975). The House Report underscored this concern by emphasizing that "this legislation will not affect apportionment or districting of Congressional seats." H.R. Rep. No. 94-944, at 4; *accord* 122 Cong. Rec. 9792 (Apr. 7, 1976) (explanation by the sponsor of the House bill).[60]

III. THE CONSTITUTION FORBIDS THE SECRETARY FROM USING SAMPLING FOR APPORTIONMENT

The Census must be conducted in a manner that is "consistent" both with "the constitutional goal of equal representation," *and* "the constitutional language." *City of New York*, 517 U.S. at 19-20. Appellants' program to use statistical sampling may or may not be consistent with equal representation, but it is surely not consistent with the constitutional language that requires the population to be determined for apportionment purposes by way of an "actual Enumeration," U.S. Const. Art. I, § 2, cl. 3. Appellants protest that the Framers did not spell out in their debates what they meant by "actual Enumeration," but the Framers had no need to do so -- the language was unambiguous. It meant counting, and excluded "estimation." At any rate, interpreting the "actual Enumeration" as a headcount of the population comports with the Framers' preference for a verifiable, objective standard. It is also consistent with historic practice. Since 1790 Congress has directed those responsible for the census to take it by counting the people.

60 Nor is there any merit to the claim that broad delegations of new authority to the Secretary were so routine as to be unremarkable. *See, e.g., Mid-Decade Census, Hearings Before the Subcomm. on Census and Statistics of the House Comm. on Post Office and Civil Service* 24, 90th Cong., 1st Sess. (Apr. 25 & 26, 1967) (statement of Committee Member advising a Bureau official that "I am not prepared to support any bill that just gives blanket authority" to the Executive Branch). Indeed, even the issue of developing techniques to adjust census results for funding purposes was described as "one of the most political issues." *1980 Census, Hearings Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 94th Cong., 2d Sess. 1 (June 1 & 2, 1976). Contrary to Intervenors' claims, the hearings concerning the 1980 census support the district court's interpretation. *See generally* WLF Br.

A. The Plain Text Of The Census Clause Precludes The Use Of Sampling

At the time of the Constitutional Convention, "actual Enumeration" had a plain meaning: To "enumerate," according to Samuel Johnson, was to "reckon up singly" or "count over distinctly." *A Dictionary of the English Language* (4th ed., 1773); *accord, e.g.*, Thomas Sheridan, *A Complete Dictionary of the English Language* (1784); John Walker, *A Critical Pronouncing Dictionary* (1794); Richard Wiggins, *The New York Expositor* (1822). Similarly, Noah Webster wrote that "to enumerate" meant "[t]o count or tell, number by number; to reckon or mention a number of things, each separately." I *An American Dictionary of the English Language* (New Haven, S. Converse, 1828).[61] "Enumeration" constituted the act of "counting or telling a number, by naming each particular," *id.*, or "numbering or counting over," Sheridan, *supra*. Thus, enumeration described a process distinct from estimation, requiring a count of the people.[62] The word "actual" also had a clear and unambiguous meaning. It meant "really in act," as opposed to "purely

61 Contrary to Appellants' understanding below (D.E. 45, at 18), an enumeration is accomplished by enumerating. Placing the suffix "-tion" at the end of a verb does not change the root meaning of the term; it only converts the verb into a noun. *See The Dictionary of Etymology* 816 (Robert K. Barnhart ed., 1995) (defining "-tion" as a "suffix forming nouns from verbs, and meaning the act or process of _____ing, as in addition"); *accord Suffixes and Other Word-Final Elements of English* 214 (Laurence Urdang, *et al.*, ed., 1982).

62 The Solicitor General used to appreciate the difference. In his argument to this Court in *Franklin*, the Deputy Solicitor General explained that when the Secretary included armed forces abroad in the census: "an enumeration is exactly what took place .... The Secretary didn't estimate the number of servicepeople abroad. [He] didn't take a sample and then extrapolate from that. The Secretary counted them." 1992 U.S. Trans. LEXIS 212, at *4-*5.

in speculation." Johnson, *supra*; Sheridan, *supra*. When the Framers used the term "actual Enumeration," therefore, they anticipated a procedure by which the government would actually "count" or "reckon-up" the people, one by one.[63]

In Appellants' view, because the Constitution vests Congress with the duty to direct the "Manner" in which the "actual Enumeration" is made, an "actual enumeration" means no more than the "action of ascertaining an official count of the number of persons who exist," and the "manner" of ascertaining that official count is entirely up to Congress or its delegate. Br. 40-41. Appellants are mistaken in this. Had the Framers intended to leave the manner of determining the population entirely up to Congress, they could have used more general language.[64] They chose, however, to require Congress to make an "actual Enumeration." Appellants' invocation of Congress's duty to direct the manner in which this enumeration is conducted merely begs the question of what the Framers meant by an actual enumeration.

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[63] As Art. I, § 9, cl. 4 of the Constitution suggests, "census" was synonymous with "enumeration of inhabitants." *See* Noah Webster, *A Compendious Dictionary of the English Language* (New Haven, S. Press, 1806); II *The Records of the Federal Convention of 1787* at 618 (Max Farrand ed., 1911) ("*Federal Convention*") (enumeration inserted as "explanatory of Census"). "Census" derives from the Latin word "censere," which means to count or reckon. 14 Am. Jur. 2d *Census* § 1 (1964).

[64] *See, e.g., Documentary Source Book of American History: 1606-1926*, at 47 (William MacDonald ed., 1926) (Article IV of the New England Confederation required apportionment according to a "true, and just account" of the numbers within each jurisdiction); *The Papers of James Madison* 27-28 (A. Longtree ed., 1840) (first draft of Articles of Confederation required a "true account" of the "number of inhabitants" to apportion the costs of government)).

B. The Ratification History Supports the Plain Meaning Of The Text

Neither Appellants, nor Intervenors, nor their amici have come forward with any evidence that the Framers intended to permit the use of estimation techniques to determine the population for purposes of apportionment. Instead, they argue that the Framers could not have cared *how* the population would be determined, because they devoted little discussion to this issue. Appellants' Br. 42; *see also, e.g.*, L.A. Br. 39-40. The Constitution's text should be accorded its plain meaning, however. The Framers unquestionably understood the difference between estimating the population and counting it,[65] and if they had intended to permit Congress to estimate the population for purposes of apportionment, they were more than capable of using language to that effect.[66] Their choice of language that instead forbids estimation should not be dismissed as sloppy drafting.[67]

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[65] The colonies often relied on estimation techniques based, *inter alia*, on polling lists, militia returns, and the number of homes. *See* James H. Cassedy, *Demography in Early America: Beginnings of the Statistical Mind, 1600:1800*, at 72, 73 (1969); Evarts B. Greene and Virginia D. Harrington, *American Population Before the Federal Census of 1790*, Note on Methods of Calculation xxiii (1932); *see generally* Patricia C. Cohen, *A Calculating People: The Spread of Numeracy in Early America* 47-76 (1982). In 1782, Thomas Jefferson estimated the population of Virginia based on limited data and specific assumptions about the Commonwealth's demographics. Thomas Jefferson, *Notes On the State of Virginia* 82-87 (William Peden ed., 1955). Jefferson is thought to have underestimated Virginia's population by only one or two percent. Alterman, *supra*, at 168-70.

[66] *See, e.g.* Article VIII of the Articles of Confederation, in *Documentary Source Book of American History: 1606-1926*, *supra*, at 199 ("All charges of war . . . shall be defrayed out of a common treasury . . . in proportion to the value of all land within each State [which] shall be *estimated*") (emphasis added).

[67] The Convention initially approved and referred to the Committee of Detail a resolution that "a Census be taken ... in the manner and according to the ratio recommended by Congress in their resolution of April 18, 1783." I *Federal Convention* at 591 (July 12, 1787); II *Federal Convention*

At any rate, the ratification history reinforces the plain meaning of the text. The records of the Convention demonstrate that, although the Framers accepted out of necessity the "conjectural ratio" by which membership in the House was initially apportioned, they inscribed in the Constitution "permanent & precise standard[s]" to govern the reapportionment of political power among the States in order to protect against political intransigence, maneuver, and manipulation. I *Federal Convention* at 578. The census was required to be taken every ten years, rather than whenever Congress might deem fit, because the Framers understood that "those who have power in their hands will not give it up while they can retain it." *Id.* Responsibility for conducting the census was placed in the hands of the national legislature, the States "be[ing] too much interested to take an impartial one for themselves." *Id.* at 580. And the census was made the "common measure for representation and taxation" to produce in the States -- which would undoubtedly have a hand in the process -- the "requisite impartiality." *The Federalist* No. 54, at 371-72 (Madison) (Jacob E. Cooke ed., 1961). Finally, the Framers adopted the fixed, objective standard of an "actual enumeration" to reduce the scope of potential disputes and minimize the opportunity for political manipulation.[68]

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at 14 (July 16, 1787). Appellants emphasize (Br. 43) a subsequent version of the clause, drafted by the Committee of Detail, which would have required the Legislature to "take[] the number" of inhabitants in each State. Appellants insist this interim version of the Census Clause -- not the final version prepared by the Committee on Style that was approved by the Convention and ratified, and that uses the words "actual Enumeration" -- should govern. This Court squarely rejected that method of interpretation in *Nixon v. United States*, 506 U.S. 224, 231-32 (1993), because it would require the courts to apply "the second to last draft [of the Constitution] in every instance where the Committee on Style added an arguably substantive word." The Court presumed that the Committee of Style's "rephrasing accurately captured what the Framers meant." *Id.*

[68] The Framers' preference for the objectivity afforded by a precise count is reflected in their debates over the use of wealth as a basis for representation. Although most delegates believed that wealth should be taken into account in apportionment, *e.g.*, I *Federal Convention* at 204-06, 578-88, the use of wealth as a measure of power was considered problematic, because it would have "requir[ed] of the Legislature something too indefinite & impracticable." *Id.* at 582 (statement of George Mason); *accord id.* at 561 (estimates of combined wealth and population would be "too vague") (statement of William Patterson); *id.* at 587, 605 (preferring population count to any attempt to "estimate [wealth] by numbers") (statement of Roger Sherman). The Framers ultimately decided to rely solely on the population count (*see id.* at 587, 605), which, although not a perfect indicator of wealth, provided a precise, objective, and verifiable measure.

Appellants protest (Br. 47) that the Framers also cared about obtaining an accurate determination. Of course they did, but the Framers sought to achieve an accurate result by requiring an actual enumeration. "The prescription of the written law cannot be overthrown" because Appellants have a new way of determining the population that they believe will be more accurate than the method required by the Framers. *McPherson v. Blacker*, 146 U.S. 1, 36 (1892).

C. Long-Standing Historical Practice Confirms The Plain Meaning Of The Text

The Framers understood from colonial experience that counting the people would be hard. Madison acknowledged from the outset the inherent "difficult[ies] attendant on the taking of the census, in the way required by the constitution." 13 *The Papers of James Madison* 15 (Hobson and Rutland ed., 1962). Presidents Washington and Jefferson were convinced that the first census substantially undercounted the nation's population. *See Baldrige v. Shapiro*, 455 U.S. 345, 353 n.8 (1982). As today, moreover, the undercount was thought to affect certain regions more than others. *See supra* at 1-2. Yet, no one suggested that Congress "augment" the census with statistical estimation, however accurate. Congress's failure to employ what would appear to have been a "highly attractive power" affords "reason to be-

lieve that the power was thought not to exist." *Printz v. United States*, 117 S. Ct. 2365, 2370 (1997).

Appellants do not seriously dispute the House's description of the legislation and historical practices that governed the census through the mid-twentieth century.[69] They argue, instead, that the enumerators in those censuses did not "count singly," because until 1850 the individuals in each household were grouped by family name, and because the numbers for each household were supplied by a single family member or neighbor. Br. 47-49. These arguments are specious. Whether the census tracked each individual by name has nothing to do with whether it determined the population by counting the number of individuals. And irrespective of whether the census taker personally counted the individuals in a household, or instead relied on a family member or neighbor, the tally was in any event derived from counting, not statistical estimation.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

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[69] Appellants observe (Br. 48) that the Bureau has in the last few decades used a statistical methodology known as "imputation" in circumstances where an enumerator knows that particular housing units are occupied, but cannot determine how many persons live there. Rather than treat these units as ones with no occupants, the Bureau has assigned to each such unit the number and characteristics of another housing unit on the same block. 53,599 persons were added to the 1990 census on the basis of this method. J.A. 82. In contrast to Appellants' sampling plan, imputation has been applied only as a last resort and always with respect to a specific housing unit based on physical evidence that the unit is occupied. *See, e.g., The Decennial Census Improvement Act, Hearing before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 100th Cong., 2d Sess. 73 (Mar. 3, 1988). Accordingly, it presents far less opportunity for manipulation than sampling used to determine the population at tract, district, and state levels. In any event, the Bureau's use of imputation in a few recent censuses has no bearing on the meaning of "actual Enumeration." *See Powell*, 395 U.S. at 547 ("Obviously, . . . the precedential value of [historical practices] tends to increase in proportion to their proximity to the Convention in 1787").

Respectfully submitted,

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APPENDIX

APPENDIX

Section 5 of Title 13, United States Code, provides as follows:

The Secretary shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title.

Section 181(a) of Title 13, United States Code, provides as follows:

(a) During the intervals between each census of population required under section 141 of this title, the Secretary, to the extent feasible, shall annually produce and publish for each State, county, and local unit of general purpose government which as a population of fifty thousand or more, current data on total population and population characteristics and, to the extent feasible, shall biennially produce and publish for other local units of general purpose government current data on total population. Such data shall be produced and published for each State, county, and other local unit of general purpose government for which data is compiled in the most recent census of population taken under section 141 of this title. Such data may be produced by means of sampling or other methods, which the Secretary determines will produce current, comprehensive, and reliable data.

Section 193 of Title 13, United States Code, provides as follows:

In advance of, in conjunction with, or after the taking of each census provided for by this chapter, the Secretary may make surveys and collect such preliminary and supplementary statistics related to the main topic of the census as are necessary to the initiation, taking, or completion thereof.